Asia Debut Sdn Bhd v Kementerian Pendidikan Malaysia & Ors

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO D-22C-35–07 OF 2014
MARY LIM J
23 OCTOBER 2014

Civil Procedure — Parties — Cause of action — Concession agreement — Telecommunications business activities — Whether plaintiff in default or breach of concession agreement — Whether shared collections with second defendant — Whether termination notices valid — Whether there was cause of action against first defendant — Whether action frivolous, vexatious and scandalous and abuse of court process — Whether action ought to be struck out

With the approval of the first defendant, the plaintiff and the second defendant entered into a concession agreement where the plaintiff was awarded an exclusive and rightful concession, licence, authority, privilege and consent to develop, construct, execute, administer, manage, maintenance and engage directly with the communication companies such as, inclusive of but not limited to, telecommunication companies, broadband providers in relation to a project to 'meningkatkan kualiti dan tahap liputan komunikasi di Universiti Malaysia Sabah (UMS) secara bersepadu dan komprehensif menerusi penyediaan secara ekslusif 'Infrastruktur Komunikasi Gunasama' dengan kerjasama Kementerian Pengajian Tinggi' on the second defendant's campus subject to terms and conditions ('the concession agreement'). The plaintiff was to share all gross collections from all new telecommunication business activities or any other receipts on a ratio of 85:15 with the second defendant for a period of 15 years and the concession period was renewable on terms and conditions. The plaintiff claimed that from July 2013 to 13 June 2014, the third defendant embarked on a fault finding mission against the plaintiff, alleging that the plaintiff was in default or breach of the concession agreement, including not sharing the collections with the second defendant. The second and third defendants terminated the concession agreement vide two termination notices; the first of which was described as a mutual termination whereas the second was by reason of the plaintiff's default. The second and third defendants alleged that the plaintiff's non-entry of tenancy agreements with telecommunication companies was deliberate in order to avoid paying the second defendant's share of collections. It was also alleged that the plaintiff had built communication towers without obtaining the necessary approvals from the authorities, in particular the Multimedia and Communications Commission. The second and third defendants issued yet another termination notice to the same effect and purpose. The plaintiff claimed that the first two notices are invalid and that

the second and third defendants are in fact in breach of the concession agreement. The plaintiff has also claimed that it did not receive the third termination notice. The present claim primarily sought declaratory orders that the first two termination notices were invalid and void, specific performance of the concession agreement, damages and an injunction to be ordered against the second defendant.

Held, allowing the application:

(1) There was no cause of action disclosed against the first defendant. Other than the broad pleas relating to the general description of the first defendant and that the first defendant was vicariously liable and in breach of its duty of care, there was really nothing else to indicate why the first defendant was even brought in to this claim which was really a claim for breach of contract between the second and third defendants. The reliefs sought were also against these defendants and not, the first defendant. The amended statement of claim was bereft of details essential to sustain a proper plea. The court agreed that the action against the first defendant was frivolous, vexatious and scandalous and furthermore, an abuse of process of court. Accordingly, the action was struck out against the first defendant with RM5,000 costs (see para 10).

(2) Following the amendments and the issuance of the new Rules of Court 2012, this court now has the power to order a transfer of a case to the High Court at Sabah and Sarawak. Prior to these Rules, the High Court's power to transfer to another court of coordinate jurisdiction was confined or restricted to another High Court within the local jurisdiction of the appropriate High Court, which in this case would be to any of the other locations of the High Court within West Malaysia. As the two High Courts of Malaya and High Court of Sabah and Sarawak were courts of coordinate jurisdiction, one High Court could not, at that time, transfer to another High Court. The conditions for a transfer to the High Court at Kota Kinabalu were fulfilled and it was in the interests of justice that the case be accordingly transferred to the High Court at Kota Kinabalu (see paras 18 & 20).

[Bahasa Malaysia summary

Dengan kebenaran defendan pertama, plaintif dan defendan kedua memasuki perjanjian konsesi yang mana plaintif diawardkan konsesi eksklusif dan sah, lesen, kuasa, hak istimewa dan keizinan untuk membangunkan, membina, melaksanakan, mentadbir, menguruskan, menyelenggarakan dan berkerja secara terus dengan syarikat komunikasi seperti, termasuk tetapi bukan terhad kepada, syarikat-syarikat telekomunikasi, pemberi khidmat jalur lebar berkaitan projek untuk 'meningkatkan kualiti dan tahap liputan komunikasi di Universiti Malaysia Sabah (UMS) secara bersepadu dan komprehensif menerusi penyediaan secara eksklusif 'Infrastruktur Komunikasi Gunasama'

dengan kerjasama Kementerian Pengajian Tinggi' di kampus defendan kedua tertakluk kepada terma dan syarat ('perjanjian konsesi'). Plaintif hendaklah berkongsi kesemua pengutipan kasar daripada kesemua aktiviti perniagaan telekomunikasi baru atau mana-mana penerima lain atas ratio 85:15 dengan defendan kedua bagi tempoh 15 tahun dan tempoh konsesi boleh diperbaharui atas terma dan syarat. Plaintif mendakwa bahawa dari Julai 2013 sehingga 13 Jun 2014, defendan ketiga memulakan misi mencari kesalahan terhadap plaintif, dengan mendakwa bahawa plaintif adalah mengingkari atau memungkiri perjanjian konsesi, termasuk tidak berkongsi pengutipan dengan defendan kedua. Defendan kedua dan ketiga menamatkan perjanjian konsesi melalui notis penamatan; yang pertama adalah disifatkan sebagai penamatan bersama di mana yang keduanya adalah atas alasan kegagalan plaintif. Defendan kedua dan ketiga mendakwa bahawa ketidakmasukan perjanjian sewaan plaintif dengan syarikat-syarikat telekomunikasi adalah sengaja untuk mengelak daripada membayar bahagian pengutipan defendan kedua. Ia juga didakwa bahawa plaintif telah membina menara komunikasi tanpa mendapatkan kebenaran yang perlu daripada pihak berkuasa, tertutamanya Suruhanjaya Multimedia dan Komunikasi. Defendan kedua dan ketiga mengeluarkan notis penamatan yang lain kepada kesan dan tujuan yang sama. Plaintif mendakwa bahawa notis-notis yang pertama dan kedua adalah tak sah dan bahawa defendan kedua dan ketiga sebenarnya memungkiri perjanjian konsesi. Plaintif juga mendakwa bahawa ia tidak menerima notis penamatan ketiga. Tuntutan ini adalah terutamanya memohon perintah-perintah perisytiharan bahawa kedua-dua notis penamatan pertama adalah tak sah dan batal, perlaksanaan spesifik perjanjian konsesi, ganti rugi dan injunksi diperintahkan terhadap defendan kedua .

Diputuskan, membenarkan permohonan:

(1) Tidak terdapat kausa tindakan yang dikemukakan terhadap defendan pertama. Selain daripada pli yang berkaitan kepada penjelasan am defendan pertama dan bahawa defendan pertama adalah bertangungang secara vikarius dan memungkiri kewajipan berhati-hatinya, tidak ada apa yang lain untuk menunjukkan mengapa defendan pertama membawanya ke dalam tuntutan ini yang mana adalah betul-betul tuntutan untuk kemungkiran kontrak di antara defendan kedua dan ketiga. Relief-relief yang dipohon juga adalah terhadap defendan-defendan ini dan bukan, defendan pertama. Pernyataan tuntutan yang dipinda tidak mengandungi butir-butir penting untuk mengekalkan pli betul. Mahkamah bersetuju bahawa tindakan terhadap defendan pertama adalah remeh, temeh dan menyusahkan dan selanjutnya, penyalahgunaan proses mahkamah. Dengan itu, tindakan dibatalkan terhadap defendan pertama dengan kos sebanyak RM5,000 (lihat perenggan 10).

(2) Berikutan pindaan dan penerbitan Kaedah-Kaedah Mahkamah 2012

baru ('Kaedah-Kaedah'), mahkamah ini sekarang mempunyai kuasa untuk memerintah pindahan kes ke Mahkamah Tinggi Sabah dan Sarawak. Sebelum Kaedah-Kaedah tersebut, kuasa Mahkamah Tinggi untuk memindah kepada mahkamah berbidang kuasa setara adalah terhad kepada Mahkamah Tinggi yang lain dalam bidang kuasa tempatan Mahkamah Tinggi yang wajar, yang mana dalam kes ini adalah mana-mana lokasi lain Mahkamah Tinggi di Semenanjung Malaysia. Memandangkan kedua-dua Mahkamah Tinggi Malaya dan Mahkamah Tinggi Sabah dan Sarawak adalah mahkamah berbidang kuasa setara, satu Mahkamah Tinggi tidak dapat, pada masa tersebut memindahkan kepada Mahkamah Tinggi yang lain. Syarat untuk pindahan ke Mahkamah Tinggi Kota Kinabalu adalah dipenuhi dan ia adalah dalam kepentingan keadilan bahawa kes dipindahkan dengan wajar ke Mahkamah Tinggi Kota Kinabalu (lihat perenggan 18 & 20).]

Notes

For cases on parties in general, see 2(1) *Mallal's Digest* (5th Ed, 2014 Reissue) paras 6149–6426.

Cases referred to

Fung Beng Tiat v Marid Construction Co [1996] 2 MLJ 413; [1997] 2 CLJ 1, FC (refd)

Legislation referred to

Courts of Judicature Act 1964 s 23
Rules of Court 2012 O 57 rr 1(1) (4)(A) (E)
Universities and University Colleges Act of 1971 s 6

Hariharan (K Tinakaran with him) (Ali Kamaruddin & Ravi) for the plaintiff.
Firoz Hussein Ahmad Jamaluddin (Wan Azmir Wan Majid, Choo Si Lin and Muhammad Asmirul Asraf Fadli with him) (Hafarizam Wan & Aisha Mubarak) for the defendants.

Mary Lim J:

[1] These are the facts. The plaintiff is a company with its registered place of business here in Kuala Lumpur. When the suit was first filed, the first defendant was described as a ministry of the Government of Malaysia responsible for amongst others, drafting, implementing and monitoring activities of institutions of higher learning. Paragraph 2 of the original statement of claim states that a ministry known as the Ministry for Higher Education now is a part of the first defendant. The second defendant is a public institution of higher learning. Its place of service is at Jalan UMS, 88400 Kota Kinabalu, Sabah. According to s 6 of the Universities and University Colleges Act of 1971, the second defendant is deemed to be a body corporate. The third defendant is the

Vice Chancellor of the first defendant. His place of residence is described at para 4 as being the same as the first defendant's.

[2] According to para 5, the plaintiff had applied on 20 July 2009 to the first defendant to be the exclusive supplier of 'infrastruktur komunikasi gunasama termasuk fiber ducting, jaringan gentian optic, fiber pole, system IBC (in-building coverage), camouflage rooftop antenna' (proposed development) for higher institutions in Malaysia. The first defendant agreed to the plaintiffs proposal and the second defendant was accordingly informed on 22 July 2009.

[3] On 15 October 2013, the plaintiff and the second defendant entered into a concession agreement wherein the plaintiff was awarded an exclusive and rightful concession, licence, authority, privilege and consent to develop, construct, execute, administer, manage, maintenance and engage directly with the communication companies such as, inclusive of but not limited to, telecommunication companies, broadband providers, etc (its agents or clients) in relation to a project to 'meningkatkan kualiti dan tahap liputan komunikasi di Universiti Malaysia Sabah (UMS) secara bersepadu dan komprehensif menerusi penyediaan secara ekslusif 'Infrastruktur Komunikasi Gunasama' dengan kerjasama Kementerian Pengajian Tinggi' on the second defendant's campus subject to terms and conditions to be found in the agreement ('concession agreement').

[4] Pursuant to the terms and conditions of the concession agreement, the plaintiff had the exclusive rights to build, provide and maintain certain communications infrastructures on the second defendant's campus; and enter into tenancy agreements with telecommunication companies for the renting of the telecommunication infrastructures and services provided. The plaintiff was to share all gross collections from all new telecommunication business activities or any other receipts on a ratio of 85:15 with the second defendant for a period of 15 years. The concession period was renewable on terms and conditions.

[5] The plaintiff claimed that from July 2013—13 June 2014, the third defendant embarked on a fault finding mission against the plaintiff, alleging that the plaintiff was in default or breach of the concession agreement, including not sharing the collections with the second defendant. On 13 June 2014, the second and third defendants terminated the concession agreement vide two termination notices; the first of which was described as a mutual termination whereas the second was by reason of the plaintiff's default. The second and third defendants allege that the plaintiff's non-entry of tenancy agreements with telecommunication companies was deliberate in order to avoid paying the second defendant's share of collections. It was also alleged that the plaintiff had built communication towers without obtaining the necessary

approvals from the authorities, in particular the Multimedia and Communications Commission.

[6] On 16 June 2014, the second and third defendants issued yet another termination notice to the same effect and purpose. The plaintiff claimed that the first two notices are invalid and that the second and third defendants are in fact in breach of the concession agreement. The plaintiff has also claimed that it did not receive the third termination notice.

[7] The present claim primarily seeks declaratory orders that the first two termination notices are invalid and void, specific performance of the concession agreement, damages and an injunction to be ordered against the second defendant. Defence has yet to be filed.

[8] Initially, the second and third defendants filed an application seeking a transfer of this case to the High Court of Sabah and Sarawak sitting at Kota Kinabalu. In that application, the second and third defendants argued that this court, that is, the High Court of Malaya had no jurisdiction over the matter and that the High Court which has the requisite jurisdiction is the High Court at Kota Kinabalu. According to learned counsel for the second and third defendants, this is because of the operation of s 23 of the Courts of Judicature Act 1964 (Act 91).

[9] On 21 August 2014, that application was dismissed with costs in the cause on the grounds that this court had jurisdiction. At that time of consideration, the first defendant was still a party to the proceedings.

[10] On 15 September 2014, this court allowed the application of the learned senior federal counsel to strike out the claim against the first defendant. After the hearing parties, the court was satisfied that grounds for such an application had been made out. The court found that there was no cause of action disclosed in the amended statement of caim against the first defendant. Other than the broad pleas relating to the general description of the first defendant found at para 5, and that the first defendant was vicariously liable and in breach of its duty of care found at para 36, there was really nothing else to indicate why the first defendant was even brought in to this claim which is really a claim for breach of contract between the second and third defendants. The reliefs sought are also against these defendants and not, the first defendant. The amended statement of claim was bereft of details essential to sustain a proper plea. The court agreed that the action against the first defendant was frivolous, vexatious and scandalous and furthermore, an abuse of process of court. Accordingly, the action was struck out against the first defendant with RM5,000 costs.

[11] There was no appeal against that order. A

[12] Following from that order, the first defendant was no longer a party to the action. At this point, learned counsel for the second and third defendants rose to make an oral application to transfer the case to the High Court sitting at Kota Kinabalu. The plaintiff had no objections to the application being taken orally. B

[13] It was the argument of learned counsel for the second and third defendants that with the first defendant no longer a party to the action, the requirements of s 23 of the Courts of Judicature Act 1964 would now come into play for its full force and purport. Since there was no longer a defendant with a residence in West Malaysia, it was contended that the conditions of s 23 were not met. That being the case, it was appropriate for this court to then exercise its powers under O 57 of the Rules of Court 2012, and order a transfer of this case to the High Court of Sabah and Sarawak sitting at Kota Kinabalu on the ground of forum conveniens. C D

[14] The application to transfer was opposed by the plaintiff. Learned counsel for the plaintiff contended that there were two principal issues in its claim against the second and third defendants. Those issues are as identified earlier. The plaintiff argued that since it bore the burden of proof and all its material witnesses were from West Malaysia, there was no basis for a transfer to Kota Kinabalu. It was really more convenient to hear the case here rather than at Kota Kinabalu. E F

[15] The plaintiff also raised the issue of res judicata; arguing that the defendants could not make this application the second time round after the first application had been dismissed. G

[16] It is the court's view that the principles of res judicata do not operate. With the first defendant no longer in the picture, the reasons and case for a transfer further was of merit. The conditions under s 23 of the Courts of Judicature Act 1964 read together with O 57 r 1(1) and (4)(A) to (E) of the Rules of Court 2012 were met. H

[17] Order 57 rr 1(1) and (4)(A) to (E) allow this court to transfer any proceedings to another court including a court of coordinate jurisdiction. The provisions read as follow: I

TRANSFER OF PROCEEDINGS

1. Transfer of proceedings to another Court (O 57 r 1)

A (1) Where the Judge of the High Court or a Judge of the Sessions Court or a Magistrate is satisfied that any proceedings in that Court can be more conveniently or fairly tried in some other Court of co-ordinate jurisdiction, he may on application by any party, order the proceedings to be transferred to the other Court.

B (2) A transfer of any proceedings from—

(a) a Subordinate Court to the High Court; or

(b) the High Court to a Subordinate Court,

shall only be made by an order of that High Court Judge on application by C any party by originating summons or notice of application, whichever is appropriate.

(3) A transfer of any proceedings from—

(a) a Magistrates' Court to a Sessions Court; or

D (b) a Sessions Court to a Magistrates' Court,

shall only be made by an order of that Sessions Court Judge on application by any party by originating summons or notice of application, whichever is appropriate.

E (4) Before making any order to transfer any proceedings from—

(a) the High Court to another High Court of co-ordinate jurisdiction;

(b) a Subordinate Court to the High Court;

(c) the High Court to a Subordinate Court; or

F (d) a Subordinate Court to another Subordinate Court,

the High Court Judge or the Judge of the Sessions Court or Magistrate, as the case may be, shall take into consideration whether the High Court or Subordinate Court which shall hear the case is located at or nearest to the place where —

G the cause of action arose;

the defendant, or one of the several defendants, resides or has his place of business;

the facts on which the proceedings are based exist or are alleged to have H occurred;

the land the ownership of which is disputed is situated; or

for other reasons it is desirable in the interests of justice that the proceedings should be transferred.

I

[18] Following the amendments and the issuance of the new Rules of Court 2012, this court now has the power to order a transfer of a case to the High Court at Sabah and Sarawak. Prior to these Rules, the High Court's power to transfer to another court of coordinate jurisdiction was confined or restricted

to another High Court within the local jurisdiction of the appropriate High Court, which in this case would be to any of the other locations of the High Court within West Malaysia. As the two High Courts of Malaya and High Court of Sabah and Sarawak are courts of coordinate jurisdiction, one High Court could not, at that time, transfer to another High Court. That was clearly held to be the case in *Fung Beng Tiat v Marid Construction Co* [1996] 2 MLJ 413; [1997] 2 CLJ 1.

[19] The Rules of Court 2012 have amended and addressed that position under O 57. With the amendment, one High Court can now transfer the proceedings to the other High Court where previously it could not. The court agrees that the factors for a transfer under O 57 rr 1(4)(A) to (E) have been met. Not only does the cause of action, which is one founded in contract, arise in Sabah, the contract was also made there. The facts upon which the plaintiff is making its case also either occurred in Sabah or are related or connected in one way or another with Sabah. Further, the only defendants now left in the action undeniably reside or are from Sabah. Under the provisions of s 23 of the CJA as well as O 57, it is the location of the defendants and the witnesses of the defendants which are of relevant consideration; and not, that of the plaintiff. The factors that are present amply demonstrate that the forum conveniens here is the High Court of Sabah and Sarawak sitting at Kota Kinabalu.

[20] The conditions for a transfer to the High Court at Kota Kinabalu are fulfilled and this court is in any event satisfied that it is in the interests of justice that the case be accordingly transferred to the High Court at Kota Kinabalu. The application is allowed with costs in the cause.

[21] The learned deputy registrar is hereby directed to ensure compliance with O 57 r 2(1) of the Rules of Court 2012.

Application allowed.

Reported by Afiq Mohamad Noor